

# **City of Durham and The Carolina Theatre of Durham, Inc.**

## **Building and Services Agreement**

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State of North Carolina  
County of Durham

## City of Durham and The Carolina Theatre of Durham, Inc. Building and Services Agreement

This Agreement is made and entered into as of the 23 of April, 2014, between the City of Durham, a North Carolina municipal corporation ("City"), and The Carolina Theatre of Durham, Inc. (hereinafter "CTD"), 309 West Morgan Street, Durham, NC 27701, a non-profit corporation organized and existing under the laws of the State of North Carolina.

**Background.** The City is the owner of 309 West Morgan Street, upon which is a building originally built as the Durham Civic Auditorium in 1926 and became home to The Carolina Theatre in March 1992. The building is known as the Carolina Theatre, and further described as Durham County Parcel ID 103048.

The City and County of Durham funded the renovation and restoration of the Carolina Theatre in 1994 for the purpose of the revitalization of the downtown area by developing interest and support for cultural arts in the City, and preserving, restoring and maintaining the building as a historical, premier, professional quality cultural arts center.

An \$8.8 million dollar renovation was completed in two phases (phase I in 2008 and phase II in 2011) with direct funding from the City of Durham.

CTD has provided professional management, programming, and operation of the renovated Carolina Theatre via a management agreement with the City that commenced in 1998, and ends with the execution of this Agreement. The Carolina Theatre of Durham, Inc. exists as an independent 501 (c) (3) non-profit organization. CTD promotes historical knowledge and appreciation of the Durham Auditorium/Carolina Theatre and has successfully used the building as a place for accommodating a variety of entertainment events, concerts, family shows, festivals and other events normally found in similar cultural arts theaters of CTD's size and nature, as well as for other educational, family entertainment, and cultural events appropriate to the City's mission. CTD's stated mission is to serve greater Durham and the Triangle region with vibrant, thought-provoking programs of the performing and cinematic arts. The organization carries out its mission through its management of the Carolina Theatre and its undertaking of the following programs:

- a. Live Events Programming
- b. Film Programming

- c. Facility Rentals
- d. Concessions

Both the City and CTD are cooperating through this Agreement to support programming and operations of performing arts, with the goal of achieving a self-sustaining status.

CTD also actively pursues and receives both earned and contributed funding from a variety of public and private sources, including, but not limited to, the State of North Carolina, private foundations, individuals, and corporations.

The City desires to provide for the professional management, programming, and operation of the Carolina Theatre to ensure it is managed and operated for the long-term benefit of the City and the general public. The City and CTD have determined that this Agreement will enhance the ability of CTD to provide a variety of cultural arts programs open to and for the benefit of the arts community and general public. The City desires to have CTD manage, operate, occupy, and program The Carolina Theatre, and CTD desires to perform such services for the City on the terms and conditions contained herein. Therefore, the parties hereto agree as follows:

## **ARTICLE I DEFINITION OF TERMS**

**1.1 Definition of Terms.** The following terms shall have the meanings indicated when used in this Agreement:

“Accounting Principles” or “GAAP” shall mean the then-current generally accepted accounting principles consistently applied using the cash basis method of accounting.

“Agreement” shall mean this Agreement including any and all exhibits attached hereto.

“Annual Fee” shall mean the total amount paid by the City to CTD for all purposes of this Agreement.

“Annual Operating Budget” shall mean the budget adopted by CTD’s Board of Trustees for each Fiscal Year during the term of this Agreement.

“Audio-Visual Equipment” shall mean all audio equipment and all visual projection equipment, whether fixed or moveable.

“Chief Executive Officer” shall mean the CTD President/Chief Executive Officer.

“Carolina Theatre” shall mean the City-owned building located at 309 West Morgan Street, as previously described in the “Background” paragraph of this Agreement.

“Director of General Services” shall mean the Director of the City’s General Services Department.

“Employees” shall mean employees of CTD.

“Fixtures Furnishings and Equipment” or “FF+E” shall mean all fixtures, furnishings, furniture, and equipment with a purchase price of at least \$500, which are purchased rather than leased, but not including Inventories.

“Facility Maintenance Fee” shall mean the flat fee provided for operation and maintenance of the Carolina Theatre.

“Facility Maintenance Plan” or “FMP” shall mean the plan which defines the Preventive Maintenance tasks CTD is required to perform pursuant to Section 3.2. The Facility Maintenance Plan is attached as Exhibit A and made part of this Agreement. A software program containing the task checklists set forth in the FMP and other additional background and explanatory material has also been provided to assist CTD in fulfilling its facility maintenance obligations, and Exhibit A defines CTD’s obligations for the FMP under this Agreement.

“First Class” for purposes of describing either party’s obligations to operate, maintain and repair the Carolina Theatre shall mean maintained and equipped in a manner consistent with other United States performing arts venues that are generally recognized in the industry as being first class venues capable of providing patrons with a quality experience in all material respects.

“First Class Municipal Arts Centers” shall mean facilities of the same or similar size, engaged in the same or similar operations in a metropolitan area that is similar in size to the City and County of Durham.

“Fiscal Year” or “FY” shall mean July 1 through June 30.

“Governmental Authority” shall mean the United States of America, the State of North Carolina, the City, the County of Durham and any agency, department, commission, board, bureau, instrumentality or political subdivision of any of the foregoing, now existing or hereafter created, having jurisdiction over the CTD, this transaction or the Carolina Theatre, and improvements thereon or any portion thereof.

“Inventories” shall mean stocks of supplies and resale items held by CTD on behalf of the Carolina Theatre.

“Non-Routine Repairs and Maintenance” shall mean those items of repair and maintenance that are not Routine Repairs and Maintenance as defined below.

“Owner” shall mean the City of Durham.

“Preventive Maintenance” shall mean the performance of regular and routine facility and equipment inspection tasks in accordance with the Carolina Theatre Facility Maintenance Plan.

“Public Accountant” shall be any Certified Public Accountant selected by CTD.

“Required Service Contracts” shall mean service contracts for the minor repair and regular maintenance of:

- (a) elevators;
- (b) heating, ventilation and air conditioning; and
- (c) emergency systems

“Requirements” shall mean all acts, laws, rules, orders, permits, ordinances, regulations, codes, and executive orders of any Governmental Authority.

“Routine Repairs and Maintenance” shall mean any repairs or maintenance of the Carolina Theatre that in the reasonable judgment of the City could be done by Employees or which is covered by any Required Service Contract, and which is required as a result of regular operation of the building.

## **1.2 Interpretation**

1.2.1 Gender and Plurality. Words of the masculine gender mean and include correlative words of the feminine and neuter genders, and words importing the singular number mean and include the plural number, and vice versa.

1.2.2 Persons. Words referring to persons include firms, companies, associations, general partnerships, limited partnerships, trusts, business trusts, corporations, and legal entities, including public bodies, as well as individuals.

1.2.3 CTD Obligations at its Expense. Wherever an obligation is described in this Agreement as being that of CTD, the expense of fulfilling that obligation is also that of CTD.

1.2.4 City Obligations at its Expense. Wherever an obligation is described in this Agreement as being that of the City, the expense of fulfilling that obligation is also that of the City.

**ARTICLE II**  
**PROGRAMMING SERVICES OF**  
**THE CAROLINA THEATRE OF DURHAM, INC.**

**2.1 Appointment.** The City appoints and contracts with CTD to supervise, direct, control, manage, program, and operate the Carolina Theatre for the term provided in Article IV in accordance with the terms and conditions of this Agreement. CTD shall apply sound administrative, accounting, budgeting, operational, sales, advertising, personnel and purchasing policies and practices, including those concerning compliance with legal requirements, in compliance with CTD's obligations under the terms and conditions of this Agreement, and in such a manner as to maximize net revenues and preserve the assets that comprise CTD.

**2.2 Credit to the City.** In an effort to heighten public awareness of the City's investment in downtown culture, specifically in preserving, maintaining, and operating the historic landmark Carolina Theatre as a cultural resource for civic groups, private citizens and numerous arts organizations, CTD shall administer the following:

(a) CTD shall include the City logo in every edition of Show Time magazine or similar publications which include general information on the Carolina Theatre and events and are widely distributed to audiences and the public. The City logo shall not be included on pieces that are exclusively for the purposes of marketing events, such as brochures, flyers postcards, or posters. Inadvertent failure to include a City logo on a CTD publication or its website shall not constitute default of this Agreement. Further, CTD shall not be required to display a City logo on promotion for CTD programs that are not funded by the City.

(b) CTD shall continuously include the City logo and web-site link on CTD web sites.

(c) The City and CTD logos will be affixed to all Carolina Theatre doors in an adhesive resembling etched glass.

(d) Nothing in this section shall require CTD to identify the City as a donor to the CTD.

**2.3 Programs and Services.** The City provides partial support for CTD's arts programs and services through this Agreement. CTD's cultural arts programs and services are to be provided in two ways:

**2.3.1 Creating Community Access to the Arts.** CTD shall manage and program the Carolina Theatre to provide a premier venue for performing artists, non-profits, students, individuals, and interested community, regional, national, and international groups to create, present, share, and enjoy diverse cultural works. CTD shall provide daily maintenance, reception, security, office and rental services to arts program participants and

rental clients. CTD shall make the facility accessible to the community through rental rates that include private rental rates and City encourages a lower rate for non-profit organizations.

The Carolina Theatre hours shall be determined by CTD as appropriate. The Cinemas are open 364 or 365 days per year, depending on film schedule. Regular Box Office hours are currently Monday-Friday, 11:00 a.m. to 6:00 p.m., but subject to change seasonally and based on demand. The Box Office is also open during times when the Cinemas are in operation and when live events and rentals are taking place as warranted. This section shall not be intended to establish minimum hours or a schedule on which the box office shall be open to the public. CTD shall continue to produce signature downtown arts events, such as the North Carolina Gay and Lesbian Film Festival, and support other signature events such as Full Frame Documentary Film Festival, Comic-con, and Durham Art Walk. The CTD may choose to provide events free to the public or charge admission, at its discretion. CTD may choose to develop and offer different major public arts events based on changing community needs and funding resources available. CTD may choose to eliminate existing programs based on demand, market conditions, financial viability, or other factors.

**2.3.2 Providing High Quality Community Programming for People of all Ages.** CTD actively promotes the CTD to local, regional, national, and international groups and promoters.

CTD shall obtain financial support for its operations and the arts community through fundraising from foundations, corporations and individuals, as well as by developing revenue sources through its programming and Carolina Theatre rentals.

**2.4 Advertising and Marketing.** CTD shall plan, prepare, supervise, produce, distribute, and place such marketing, advertising, public relations and promotional programs or campaigns for CTD, as it deems necessary or appropriate, at its sole cost and expense.

## **2.5 CTD Rentals and Reservations.**

**2.5.1** CTD will, in its sole discretion, represent, promote, and lease the Carolina Theatre and its facilities to interested community, regional, national, and international groups. Such discretion shall be subject to the section of this Agreement entitled, "Non-discrimination." The City shall not interfere with the programming of CTD, or the marketing of that programming, and shall not be liable for the programming or marketing decisions of CTD.

**2.5.2** CTD may sublet or rent space in the Carolina Theatre to third parties. CTD will set the rental rates and fees for services for third parties. CTD will process space rental reservations for the Carolina Theatre through CTD's reservation system. The City agrees to honor all reservations made by CTD in the ordinary course of business, so long as such reservations do not extend beyond the period of three years subsequent to the termination of this Agreement, and the proposed third party renters. At such time in the future as the CTD may choose to change facility



rental prices, CTD will notify the City of such change.

**2.5.3 City Use of Facilities.** CTD shall waive all space rental fees for use of space at the Carolina Theatre requested by the City, provided that the City is the primary beneficiary of such space use, and further provided that:

- (a) such space has not previously been committed to another user;
- (b) the request by designees of the City Council, the City Manager and Department Directors for such space be made in writing;
- (c) the City will pay CTD's out-of-pocket expenses, including but not limited to labor, set-up and clean up, and will be invoiced by CTD. The City will pay CTD's published rental rates for use of CTD-owned Audio-Visual Equipment; and
- (d) City uses of the Carolina Theatre without charge are to be limited to no more than 12 times per year, with space request being made not more than 45 days in advance of the requested use date. The City may request space use without charge an additional 6, times per year, if the request is made not more than 7 days in advance of the requested use date.

**2.6 Restoration Fees.** The CTD may increase the restoration fees on all tickets sold on live performances or on film presentations up to a total amount not exceeding a total charge of \$2.00 per ticket in 2013-2014, and at its discretion in future years under this agreement to an amount based on market conditions and industry comparisons. In its annual budget proposal, CTD shall disclose to the City what the restoration fee is proposed to be for the coming fiscal year.

**2.6.1** Restoration fees collected shall accrue as revenue to the CTD, and such revenue shall not be shared with the City.

**2.7 Programming.** CTD shall have the sole and exclusive right to determine, the responsibility for determining, and shall bear all expenses for, the programming mix of all CTD-sponsored events held in the Carolina Theatre. CTD will also have sole responsibility and bear all expenses for marketing said events.

**2.8 Box Office.** CTD shall have the sole and exclusive right and responsibility to establish, operate and manage, and shall bear all expenses for, CTD sales of tickets, program registrations, and event registrations, and such off-site or online ticket outlets as may be deemed appropriate by CTD. CTD shall also establish procedures and facilities for phone sales or online sales as CTD deems appropriate.

**2.9 Audience Services.** CTD shall be responsible for the orderly and professional operation of all audience services, including but not limited to: providing or causing to be provided printed programs, when necessary or expected; concessions services including food, beverage, gifts and souvenirs; ticket takers, ushers, ticket sellers, and, as required by

law or the customary standards of care in the industry, security and/or emergency and medical services.

**2.10 Non-discrimination.** CTD shall not violate any Requirements, including without limitation those with regard to discrimination against or segregation of any person, or group of persons on account of sex, sexual orientation, age, race, color, creed, religion, handicap, national origin or ancestry in employment at CTD, or in the sale, lease, sublease, transfer, use, occupancy, tenure, or enjoyment of the Carolina Theatre or its programs therein, nor shall CTD or any person claiming under or through CTD establish or permit any such violation or practice of discrimination or segregation with reference to such employment or the selection, location, number, use or occupancy of guests, tenants, lessees, subtenants, sublessees or vendees of CTD. The City and CTD intend this section to bar rental of the Carolina Theatre to third parties which the CTD knows or should have reasonably known intend to use the Carolina Theatre to espouse or implement discrimination or segregation on account of sex, sexual orientation, age, race, color, creed, religion, handicap, national origin or ancestry. Nothing in this section will require CTD to engage in censorship or to in any way limit free speech or freedom of expression in CTD's programming or in its selection of performers, artists or programs, so long as CTD shall exercise its best efforts to choose artists who do not espouse discrimination in violation of this section.

**2.11 Supervisory and Management Services.**

2.11.1 The CTD Board of Trustees shall select, appoint, and supervise the CTD Chief Executive Officer, and the CTD Chief Executive Officer shall select, appoint, and supervise such other personnel as are necessary for the proper operation, maintenance, and security of CTD. The CTD Chief Executive Officer and all personnel of CTD shall be Employees of CTD and the terms of their employment, including compensation, shall be at the sole discretion of CTD. The salaries and all additional costs of employment of the Employees shall be borne by CTD. It is understood that beyond its Employees, CTD additionally engages a variety of independent contractors for educational programs and other arts programmatic and operational needs, and shall continue to do so at its discretion.

2.11.2 CTD agrees to operate the Carolina Theatre for the City in compliance with all Requirements. CTD agrees to operate the Carolina Theatre in accordance with the requirements of the carriers having insurance on the Carolina Theatre or any part thereof. Both the City and CTD shall have the right to contest requirements of an insurance carrier unless failure to comply promptly would or might expose either party to criminal liability or to civil penalty. CTD shall obtain and shall keep in force any and all licenses or permits necessary for the operation of CTD, the costs of which shall be borne by CTD. Where applicable, CTD will name the City as the Owner of the Carolina Theatre.

2.11.3 CTD shall collect, account for, and remit promptly to the proper Governmental Authority all applicable taxes or similar governmental charges collected at CTD

directly from patrons or guests, or as part of the sales price of any goods, services, or displays, such as occupancy, gross receipts, admission, cabaret or similar or equivalent taxes to the extent that such taxes are required to be paid by the City or CTD.

2.11.4 CTD warrants that it has established, implemented and supervised the accounting, inventory, and cost control systems necessary for the efficient operation and Routine Repair and Maintenance of the Carolina Theatre. CTD will maintain adequate control over any records of CTD regarding the acquisition and disposition of all FF & E and Inventories used in the operation of CTD. The cost of the aforesaid maintenance of records will be borne by CTD. CTD shall not dispose of any FF+E owned in part or in whole by the City unless it has received explicit written permission from the City as to the item to be disposed of and the method of disposition.

### **ARTICLE III**

#### **FACILITIES SERVICES AND MAINTENANCE**

**3.1 General Operation and Maintenance Obligations of CTD.** Except as otherwise expressly provided herein, the CTD shall, at its sole cost and expense, pay all the expenses of maintaining and operating the Carolina Theatre, including, but not limited to:

(a) the cost of Inventories consumed in the proper operation of the Carolina Theatre building;

(b) the cost and expense of Routine Repairs and Maintenance, as specified in the Facilities Maintenance Plan, which is attached as Exhibit A and incorporated by reference in this Agreement. Repairs required as a result of building systems failures or defects shall be the responsibility of the City; and

(c) security, pest extermination, cleaning, trash removal, all Required Service Contracts, and other necessary services for the proper operation of the Carolina Theatre.

3.1.1 CTD shall use, operate, and maintain the Carolina Theatre to Minimum Performance Standards, which shall mean, in a condition consistent with its condition as of the date of this Agreement (excepting normal wear and tear), and in accordance with uses and standards prevailing in First Class Municipal Arts Centers of comparable size, class and standing, and in accordance with the Facilities Maintenance Plan. The FMP shall be implemented by CTD with a two year phase-in, from the date of this Agreement. During this two year period, the City shall provide monthly review of the procedures used to maintain the facility and report to CTD upon the progress toward fulfilling the FMP. Upon the start of the third year of this Agreement, CTD shall be fully responsible for implementation of the FMP.

**3.1.2 Without limitation, CTD shall:**

- (a) provide sufficient staffing to carry out all of CTD's responsibilities and obligations under this Agreement;
- (b) maintain all spaces and FF+E in good condition, in accordance with the Facilities Maintenance Plan, and repair or replace such items, or cause such repair or replacement to be made promptly, so the Carolina Theatre remains in a neat, clean, attractive, good condition at all times;
- (c) develop and establish with the Director of General Services a resource conservation program to achieve the energy-efficient management and use of utilities, and operate the Carolina Theatre in accordance with this program;
- (d) develop, establish, and follow a janitorial and cleaning program so as to keep the Carolina Theatre and its contents in a clean, sanitary and attractive condition.
- (e) remove all snow and ice promptly from the loading dock of the Carolina Theatre, and from the front and side Plaza areas, and from sidewalks and walking entrances adjacent to the Carolina Theatre;
- (f) properly, promptly and courteously process and endeavor to resolve all claims, problems, and complaints arising from the use and maintenance of the Carolina Theatre;
- (g) inspect periodically, and maintain and repair as needed, the floors and carpets of the Carolina Theatre, keeping them clean and evenly covered with the type of surface material installed at the start of this Agreement or with such substitute as shall be in all respects reasonably equal or comparable in quality, appearance and durability, subject to the City's performance of its obligations set forth in Article III. Carpets shall be vacuumed regularly and shampooed as necessary;
- (h) inspect, maintain, repair and clean all lights and lighting fixtures in the Carolina Theatre, subject to the City's performance of its obligations set forth in Article III;
- (i) keep all elevators, elevator cabs and other mechanical systems and components in good operating order and in operation during all hours the Carolina Theatre is open except as necessary for repairs. City shall pay for replacement parts and labor for any required elevator repairs for the term of the contract. CTD shall pay for annual elevator maintenance beginning July 1, 2014. Elevator cabs and lobbies shall be kept clean, and attractive and free of refuse, debris, and graffiti. The elevator cabs and lobbies shall be cleaned as necessary;
- (j) inspect all public stairs on a daily basis and keep them in a clean

and attractive condition free of refuse and graffiti, and swept or vacuumed as necessary;

(k) regularly inspect all fire extinguishers and similar fire and emergency equipment, including the battery back-up emergency lights and fire alarm pull boxes, and maintain them in good operating order and condition;

(l) keep all interior and exterior surfaces of the Carolina Theatre clean and attractive, and promptly remove all graffiti, posters, stickers and handbills, with the exception of materials of this kind displayed in CTD bulletin boards and information display racks;

(m) re-paint all peeling or blistered interior paint which requires touch up only.

### **3.2 General Repairs and Maintenance by CTD and by the City**

3.2.1 CTD shall provide all custodial and Routine Repairs and Maintenance to maintain the Carolina Theatre and all FF+E, including Audio-Visual Equipment, and theatrical lighting and sound equipment, in good repair and condition and in conformity with all Requirements, and shall make or cause to be made Routine Repairs and Maintenance. All costs shall be borne by CTD. As part of such obligations, CTD shall be responsible for performing the preventative maintenance tasks described in the Facility Maintenance Plan.

3.2.2 CTD will conduct the inspections required by the FMP and shall maintain records of such inspections for a period of time as reasonably required by the City. In addition to the FMP tasks listed in Exhibit A, CTD agrees to perform periodic visual inspections of the facility equipment and components also identified in Exhibit A. CTD and the City will conduct a monthly on-site meeting, unless the City and CTD agree to a different schedule, for the purpose of reviewing the FMP tasks performed during the monthly period and conferring on other building issues. The City may conduct a visual inspection and review of the Carolina Theatre with CTD, at the discretion of the City. Upon request, CTD shall provide copies of the records of inspections to the City. The City shall have the right to conduct periodic on-site audits and inspections of all of the Facility Maintenance Plan records maintained by CTD.

3.2.3 CTD shall at all times maintain CTD equipment in accordance with manufacturer's specifications and standards, including, if necessary, negotiating, executing or causing to be executed in its own name or in the name and on behalf of City (as CTD determines), and administering Required Service Contracts and licenses for CTD operations, including contracts and licenses for health and safety systems maintenance; boiler maintenance; air conditioning maintenance; and other service contracts and licenses necessary to comply with the Facility Maintenance Plan, under terms and conditions which are customary in operating and maintaining similar arts venues of the Carolina Theatre's size and nature. Any contractors retained pursuant to this section 3.2.3 shall be bona fide service and repair contractors who possess appropriate State licensure and factory certifications to perform

maintenance services, and shall be subject to City approval. There may be a regular property review process by the City, but neither the review process nor its findings shall relieve the CTD of its obligations. CTD shall see that all guaranties, warranties, service contracts, and licenses for which it is responsible pursuant to this section 3.2.3 are placed in the name of the City, or if placed in the name of the CTD, are assignable to the City.

3.2.4 CTD acknowledges that the CTD Facility Maintenance Plan is the original work of a third party contracted by the City specifically for use at the CTD. CTD further acknowledges that MBP Facility Pilot is proprietary and allows CTD to use the CTD Facility Maintenance Plan only for the limited purpose of the CTD. CTD agrees to use the CTD Facility Maintenance Plan solely to assist its operations at the CTD, and will indemnify and hold the City harmless if the City suffers damages as a result of CTD's use of the CTD Facility Maintenance Plan for anything other than the operation of the Carolina Theatre.

3.2.5 City agrees to be responsible for gaining performance from contractors pursuant to warranties for work done during renovations in 2011, and further agrees to be responsible for the Carolina Theatre roof and envelope, HVAC systems integrity and warranty, electrical systems integrity and warranty and plumbing systems integrity and warranty. Repairs required as a result of building envelope, HVAC, electrical systems or plumbing systems failures, defects or system installation and design flaws shall be the responsibility of the City. Routine maintenance of these systems shall be the responsibility of the CTD. For example, user errors such as overloading an electrical circuit or placing non-flushable items into a toilet fixture shall not be considered to be a building system failure, but shall instead be repaired and paid for by CTD. Changing filters on air systems is required to maintain the validity of the warranty, and shall be performed by CTD.

3.2.6 In making all repairs or replacements, all work done by CTD or the City shall be of good quality in both materials and workmanship. All repairs will be made in compliance with all Requirements.

3.2.7 In the event that CTD refuses or neglects to make any repairs required by this Agreement, or if the City is required to make any repairs necessitated by the negligent or willful acts or omissions of CTD, its employees, agents, servants, or licensees, City shall have the right, but shall not be obligated, to make such repairs on behalf of or for CTD. Prior written notice shall be provided to CTD before the City undertakes such repairs, unless it is an emergency situation in which delay in repair will result in damage to the Carolina Theatre. In the event the City shall make such repairs, the cost of the repairs shall be paid for by CTD upon receipt of a statement therefore listing the amount of the City's costs to administer a contract or the cost incurred using City forces as shall be determined from time to time by the City. Nothing herein contained shall prevent the City from determining that the failure of CTD to comply with the terms of this Section or any other term of this Agreement constitutes a material breach of this Agreement permitting the City to terminate this Agreement as herein provided.

3.2.8 Prior to the commencement of this Agreement, CTD and the City shall conduct an operational review of the Carolina Theatre to create a list of any operational equipment belonging to the City that may require repairs, and any capital items needing repair or replacement, or whose repair or replacement is contemplated during the term of this Agreement. Said list will be used to address such repairs and replacements in accordance with Section 3.3 of this Agreement.

**3.3 City Repairs and Replacement Budget.** Not later than November 15 of each year, CTD shall prepare an annual repair and replacement budget for the following:

(a) Replacements and additions to the Carolina Theatre's operating systems for which the City is responsible; and

(b) Non-Routine Repairs and Maintenance needed to maintain the Carolina Theatre in good condition. CTD shall submit said requested budget to the City for review. Said requested budget will be subject to the City's budget approval process. Whatever portion, if any, of the requested budget is approved by the City in the City's sole discretion shall be the City's Repair and Replacement Budget for the upcoming fiscal year.

**3.4 Capital improvements.**

3.4.1 CTD shall make no major capital alterations, additions, or improvements in or to the Carolina Theatre without the approval of the City.

3.4.2 CTD shall prepare an estimate of the cost for any capital improvement and shall submit such estimate to the City for its approval. City will advise CTD in advance, as to when capital improvements data is needed from the CTD. CTD shall not make any capital expenditures requiring reimbursement by the City without the approval of the City.

3.4.3 The City, as Owner of the Carolina Theatre, shall have full control over architectural and interior design matters, including, without limitations, capital improvements, replacement of City owned FF+E and repairs, maintenance and alterations.

3.4.4 CTD will replace the seats in Cinema 1, Cinema 2, and the Fletcher Hall orchestra pit by June 30, 2015 at its own expense.

**3.5 Salvage Value.** CTD, subject to compliance with the General Statutes of North Carolina, as amended, and the Charter of the City of Durham, including all requirements as to the process of disposition, may sell FF+E owned by the City which are mutually determined by CTD and the City to be no longer necessary to the operation of the Carolina Theatre. Proceeds from such sales shall be paid in full to the City.

**3.6 Annual Operating Budget and Reports.** By May 1 of each year, CTD will deliver to the City a preliminary operating budget and plan for the upcoming Fiscal Year for the operation of the Carolina Theatre ("Annual Operating Budget"). The Annual

Operating Budget will delineate what CTD projects to be the foreseeable costs and obligations to operate the Carolina Theatre in the upcoming Fiscal Year including, but not limited to, all fees to CTD, repairs, maintenance, and proposed capital improvements. CTD will respond fully to all requests for information and reporting by the City, and provide it in such form as the City may reasonably request.

### **3.7 Stage Review.**

3.7.1 CTD shall be responsible for arranging and paying for interior equipment and supplies relating to all events and programs.

3.7.2 CTD shall be responsible for conducting ongoing technical stage and facility reviews normally associated with an arts center facility such as the Carolina Theatre, including, but not necessarily limited to, inspections of the sound system, dance floors, instructional equipment, rigging, lighting and other associated systems.

**3.8 Utility Services.** CTD shall arrange for water, electricity, gas, phones, internet service, and any other necessary utilities to serve the Carolina Theatre, and shall be responsible for paying all bills relating to the consumption of such utilities on a timely basis.

### **3.9 Fixtures, Furnishings and Equipment (FF+E).**

3.9.1 FF+E has been installed and purchased by both the City and CTD prior to the execution of this Agreement. A schedule of City-owned FF+E shall be attached to this Agreement as Exhibit D, incorporated herein and made a part hereof. Any FF+E owned by CTD shall be attached to the Agreement as Exhibit C, incorporated herein and made a part hereof. Exhibits C and D shall be reviewed and updated on an annual basis, and incorporated into this Agreement as amendments thereto. The City Manager and Chief Executive Officer are hereby authorized to execute amendments to this Agreement to incorporate the updated Exhibits C and D. Ownership will remain with the respective parties as detailed in Exhibits C and D.

**3.9.3 Ownership of Replacements, Additions, and Improvements.** All fixed alterations, improvements, additions or replacements to the Carolina Theatre ("Fixture or Addition") made subsequent to the execution of this Agreement shall be the property of the City, and shall be subject to the approval of the City, unless the attachment is minor and the fixture or addition can be removed without significant disruption or damage to the Carolina Theatre. Orchestra pit seats are the property of CTD. Any damage upon removal of any fixture or addition or other equipment must be repaired by CTD to the City's reasonable satisfaction. Examples: Cubicle walls in the Administrative offices can be removed without significant damage or disruption to the Carolina Theatre. Wall mounted pieces of the historic exhibit or casework and concession shelving cannot be removed without significant damage.

**3.10 Right to Inspect Premises.** As the owner, the City has the right to enter the



Carolina Theatre and its premises, for the purpose of conducting inspections and for the repair or replacement of items required under the terms of this Agreement, at any time of its choosing.

**3.11 Notice of Obligations Forwarded Promptly.** Any notice of specific obligations (monetary or otherwise) received by CTD from any insurance carrier or any governmental agency with which the Carolina Theatre, CTD or the City must comply, and notices of non-compliance with any such obligations, shall be immediately forwarded by CTD to the City.

#### ARTICLE IV TERM

**4.1 Term.** The term of this Agreement shall be from the date of its making, being the date appearing in the first paragraph of this Agreement, unless sooner terminated as herein provided ("Initial Term"), until June 30, 2024.

**4.2 Renewal By Mutual Agreement.** The parties shall have the option of renewing this Agreement for two five-year renewal terms. CTD shall notify the City in writing of its desire to renew prior to December 31 of the Fiscal Year before a term ends. As pre-conditions to renewal of the Agreement, CTD must:

(a) have managed and operated the Carolina Theatre in such a manner that the FMP standards have been maintained; and

(b) must not be in default of any material provision of this Agreement at the time of the exercise of the option where such default has remained uncured for a period of 30 days after notice thereof to CTD by the City.

**4.3 Surrender of Premises.** Upon termination of the Agreement, CTD covenants and agrees to yield and deliver peaceably to the City possession of the Carolina Theatre and any fixtures and improvements thereto, including the City's FF+E, promptly and in good condition, order and repair, except for reasonable wear and tear occurring subsequent to the last necessary repair, replacement, restoration or renewal of the Carolina Theatre made by CTD pursuant to the CTD's obligations under this Agreement.

#### ARTICLE V PAYMENTS AND REIMBURSEMENTS

**5.1 Annual Fee.** CTD shall receive an annual fee of \$635,000.00 from the City for each Fiscal Year. The annual fee may be adjusted +/- 2.5 to 3% per year, at the discretion of the City, based on contract performance, including review of performance measures and the City's overall budget requirements. The prior year's annual fee plus the annual discretionary adjustment yields the Annual Fee for the next Fiscal Year.

Over the initial ten year duration of the contract, the maximum amount to be paid to the CTD is not to exceed \$7,433,193.39. The city would make funds available in this Agreement as follows:

Maximum Payments Over Eleven Fiscal Years	Potential 3% Maximum Annual Increase
14	\$153,630
15	\$635,000.00
16	\$654,050.00
17	\$673,671.50
18	\$693,881.65
19	\$714,698.10
20	\$736,139.03
21	\$758,223.21
22	\$780,969.91
23	\$804,399.01
24	\$828,530.98
Contract Maximum Cost	\$7,433,193.39

Minimum Payments Over Eleven Fiscal Years	Potential 3% Maximum Annual Decrease
14	\$153,630
15	\$635,000.00
16	\$615,950.00
17	\$597,471.50
18	\$579,547.36
19	\$562,160.94
20	\$545,296.11
21	\$528,937.23
22	\$513,069.11
23	\$497,677.04
24	\$482,746.73
Contract Minimum Cost	\$5,711,486.02

5.1.1 For each Fiscal Year of the Agreement, the Annual Fee shall be paid to CTD in three payments:

- (a) 50% paid by July 15 of the Fiscal Year,
- (b) 25% paid by January 15 of the Fiscal Year, and
- (d) the remaining 25% paid by April 1 of the Fiscal Year.

**5.2 Reimbursements.** Other than the Programming and Facility Maintenance Fee payments, any other payment or reimbursement due and payable from the City to CTD or from CTD to the City pursuant to this Agreement shall be paid within 15 days of the acceptance of the request for such payment or reimbursement by the other party.

**5.3 Late Payment.** In the event that CTD or the City does not make payment in full on the date a payment is due and payable to the other party pursuant to this Agreement, interest on such delinquent payments shall accrue from the due date of such payment to the date payment is received at the rate of 8%.

## **ARTICLE VI**

### **FINANCIAL REPORTS**

**6.1 Books and Records.** CTD's services to the City shall include keeping complete and adequate books and records reflecting the operations of CTD in accordance with GAAP. CTD shall at all times keep and maintain in the Carolina Theatre all records, books of account and other records relating to or reflecting the operations of CTD, including such records as the City may require CTD to maintain and any information required to be maintained pursuant to any provision of this Agreement. CTD shall preserve and make available to the City at all reasonable times for examination, audit or inspection and copying the aforesaid records, books of account, and other documents for a period of six years following the end of the applicable Fiscal Year. However, if at the expiration of such six-year period CTD is seeking to contest or is contesting any matter relating to such matters or any matters to which such records may be relevant, CTD shall preserve any records required hereunder until one year after the final adjudication, settlement or other disposition of any such contest.

**6.2 Financial Operations and Accountability.**

6.2.1 CTD's financial statements shall be prepared on the accrual basis of accounting and conform to GAAP. Financial statement presentation shall follow the recommendations of the FASB in its Statement of Financial Accounting Standards No. 117, Financial Statements for Not-for-Profit Organizations, and CTD shall account for contributions in accordance with the FASB in SFAS No. 116. Financial Reports are provided to the Board Finance Committee and the Executive Committee monthly. Financial Reports shall be provided to the full Board at its bi-monthly meetings. Detailed financial reports shall be provided to the Board Financial Operations Committee no less than quarterly. Summary financial reports shall be provided monthly to the full CTD Board of Trustees at each of their regularly scheduled meetings. All such reports shall be made available to the City upon request.

6.2.2 Audit. CTD shall submit an audited financial statement of CTD's Fiscal Year to the Director of General Services by December 31st of the following Fiscal Year, and no later than within 30 days after its completion, whichever is earlier. Said audited financial statement shall be prepared by an independent Public Accountant reasonably acceptable to the City and performed in accordance with generally accepted auditing standards.

**6.3 Semi-annual Reporting of Performance.** CTD shall provide the City Manager and the Director of General Services with two semi-annual reports each Fiscal Year, the first being provided no later than January 30<sup>th</sup> for the preceding period of July – December, and July 30<sup>th</sup> for the preceding period of January – June, with the July 30<sup>th</sup> report constituting an annual report and summarizing the performance of CTD for the Fiscal Year. CTD may include as many measures as it chooses, and the City may add measures that it requires after receipt of the annual audit. The report shall include, at minimum, reporting on Performance Measures as provided in Exhibit B, and shall follow the same format as the reporting by City departments to the City Manager.

**6.3.1 Programming and Services Performance Measures.** CTD and the City shall jointly develop performance measures with progress to be presented to the City and reviewed by the City semiannually. The performance measures shall follow the same format as City Departments. CTD may include as many measures as it chooses, and the City may add measures it wants after receipt of the annual audit. . The outcomes measured are: increased participation, satisfied and loyal customers, connected to the community, efficient operations, financial sustainability and marketing. Exhibit B provides the performance measures in detail.

**6.3.2 Facilities Maintenance and Utilities Performance Measures.**

(a) Utilities Efficiency Measure: CTD will establish measure(s) that evaluate(s) utility usage

(b) Adherence to the Facilities Maintenance Plan: Tracked according to FMP requirements. The FMP is provided by the City to CTD. This performance measure is subject to a two-year phase in from the date of this Agreement, as specified in Subsection 3.1.1.

## **6.4 Inspection and Audit of Reports**

**6.4.1** In accordance with Section 6.1 hereof, CTD shall permit the City through its employees and/or representatives, to make inspections, audits, examination or abstracts of all records and books of account required to be maintained pursuant to this Agreement. It is further understood and agreed that any such inspections, audits or examinations shall be conducted during the regular business hours of CTD and CTD will make all such records and account books available to the City at the Carolina Theatre.

**6.4.2** Notwithstanding anything to the contrary contained in this Agreement, the City shall have the right to terminate this Agreement in the event any inspection or audit by the City or its agents discloses a material discrepancy constituting neglect or gross misconduct about which the CTD Chief Executive Officer and CTD Board of Trustees knew or should have known. In the event that any inspection or audit by the City or its agents discloses a discrepancy of which CTD or its representatives did not have knowledge, and that the City deems necessary to correct, then CTD shall take such actions as are necessary to correct the discrepancy and to avoid any further discrepancies within 30 days of notification by the

City.

6.4.3 The obligations of CTD under this Article shall survive the termination of this Agreement.

## ARTICLE VII INSURANCE

**7.1 Property and Liability Insurance.** The City at its own expense and in its sole discretion shall procure and maintain property and liability insurance and/or retain the risk for the Carolina Theatre and the City's FF+E at the Carolina Theatre.

**7.2 Insurance Provided by CTD.** CTD, at its own cost, shall procure and maintain in force the following insurance while this Agreement is in effect:

(a) Workers' Compensation Insurance, during the period of this Agreement and Supplemental Agreements, and Employer's Liability Insurance with a limit of not less than \$1,000,000.

(b) Fidelity Bonds, with reasonable limits and deductibles to be mutually agreed upon by CTD and the City, covering Employees in job classifications normally bonded in other First Class Municipal Arts Centers in the United States or as required by law, and comprehensive crime insurance to the extent that CTD and the City agree it is necessary for CTD.

(c) Commercial General Liability Insurance, covering premises / operations, products/completed operations, broad form property damage, contractual liability, independent contractors (if any), and XCU coverage (explosion, collapse, and underground) if any apply to the work of this Agreement. Such insurance shall provide, at a minimum, combined single limits of not less than \$1,000,000 per occurrence, with an annual aggregate of not less than \$2,000,000.

(d) Personal And Advertising Injury Liability, covering claims and related charges/sums that CTD becomes legally obligated to pay as damages due to "personal and advertising" injury caused by CTD's offenses arising out of their operations or activities related to the performance of this contract. A limit of liability not less than \$1,000,000 per occurrence or, if an endorsement to a CGL policy, a \$1,000,000 combined single limit will be accepted.

(e) Property Insurance, covering all business personal property, FF+E and other equipment owned or controlled by CTD, including the City's interest in any improvements, renovations and fixtures made to the interior of the Carolina Theatre.

(f) Umbrella Policy, with limits of not less than \$1,000,000 in any one occurrence and \$2,000,000 in annual policy aggregate.

Insurance shall be provided by companies authorized to underwrite such coverages in the State of North Carolina, with companies having a Best rating of A-, VII or better.

Insurance shall be evidenced by a certificate, providing notice to the City of not less than 30 days prior to cancellation or reduction of coverage, and certificates shall be addressed to:

City of Durham, North Carolina  
Attention: Finance Director  
101 City Hall Plaza  
Durham, NC 27701

Both the insurance certificate and the additional insured endorsement must be originals and must be approved by the City's Finance Director before CTD can begin any work under this Agreement.

**7.3 Coverage.** All insurance described in Sections 7.1 and 7.2 may be obtained by CTD or the City by endorsement or equivalent means under blanket insurance policies, provided that such blanket policies fulfill the requirements specified herein. All blanket insurance policies shall be in form and substance, with deductible limits and risk retentions as are acceptable to the City's Risk Manager.

#### **7.4 Policies and Endorsements**

7.4.1 All insurance provided by CTD shall name The Carolina Theatre of Durham, Inc. as the Insured, and the "City of Durham, North Carolina", its officers, employees, and elected officials shall be named as Additional Insured. The additional insured coverage must be evidenced by either an original of the endorsement to effect the coverage, or, if blanket coverage is provided, then the agent shall indicate the form number in the proper section of the certificate of insurance.

7.4.2 Upon request by the City, CTD shall provide proof of all insurance it has obtained in connection with its operation of the Carolina Theatre.

7.4.3 CTD shall notify the City of any material changes, endorsements, or cancellations of the insurance hereunder within seven business days of such changes, endorsements or cancellations.

**7.5 Claims.** CTD and the City shall cooperate in a prompt manner in connection with the making and settlement of any claims and the collection of any insurance money that may be due, and shall execute and deliver such proofs of loss and other instruments which may be required for the purpose of obtaining the recovery of any such insurance monies.

**7.6 Failure to Obtain and Maintain Insurance.** If CTD fails to obtain and maintain the insurance required pursuant to this Article or, if any insurer cancels or modifies such insurance in a manner unacceptable to the City with respect to the coverages hereunder, the

City may at its discretion purchase said insurance and CTD shall reimburse the City for City may at its discretion purchase said insurance and CTD shall reimburse the City for any premiums paid by City, as provided in Section 5.2. CTD shall not perform work during any period when any policy of insurance required hereunder is not in effect unless it gives evidence, to the reasonable satisfaction of the City, of the unavailability of such insurance.

## **ARTICLE VIII EMPLOYMENT**

### **8.1 Employees.**

8.1.1 CTD shall at its sole cost and expense select and hire all of the personnel necessary or required for the operation, programming, maintenance, and security of the Carolina Theatre. Employees shall include such employees with such levels of expertise, as the manager of First Class Municipal Arts Centers of similar size would have on staff for the smooth operation of such a facility.

8.1.2 All Employees shall be employees of CTD and not of the City. The City shall have no right to hire, fire, supervise, or direct any such Employee.

8.1.3 CTD shall prepare and file punctually all forms, reports, and returns required by law relating to the Employees of CTD for the operation of CTD and Carolina Theatre.

**8.2 E-Verify Compliance.** CTD represents and covenants that it and its subcontractors comply with the requirements of Article 2 of Chapter 64 of the North Carolina General Statutes (NCGS). The City is relying on this E-Verify Compliance section in entering into this Agreement. The parties agree to this section only to the extent authorized by law. If this section is held to be unenforceable or invalid in whole or in part, it shall be deemed amended to the extent necessary to make this Agreement comply with NCGS 160A-20.1(b).

**8.3 Small and Disadvantaged Business Enterprise Plan.** In providing its services and performing all other duties, obligations and responsibilities under this Agreement, CTD shall comply with the City's Small and Disadvantaged Business Enterprise Plan, as it is and as it may be amended from time to time.

**8.4 Independent Contractor Relationship.** The City and CTD agree that with respect to the performance of the services by CTD to the City, with no limitation whatsoever, CTD shall be acting as an independent contractor. Nothing herein shall constitute, or be construed to be or create, a partnership, agency, joint venture, lease or landlord-tenant relationship between CTD and the City. CTD agrees that it will not make any representations that its relationship to the City is other than that of an independent contractor, and CTD and the City may so inform any parties with whom they deal and may take any other reasonable steps

to carry out the intent of this section.

**8.5 Exclusivity.** CTD's services shall be non-exclusive to the Carolina Theatre. CTD shall without limitation, be permitted to engage other facilities or organizations in Durham and in other cities to provide services, including consulting, booking, marketing, operations, or other services as needed. City funds will not be used for any project, facility, or partnership other than the operation of the Carolina Theatre.

## **ARTICLE IX DAMAGE, CONDEMNATION AND REPAIR**

### **9.1 Damage to or Destruction of the Carolina Theatre Facility**

9.1.1 In the event that the Carolina Theatre or any portion thereof shall be damaged or destroyed at any time or times during the Initial Term or any Renewal Terms by fire, casualty or any other cause, CTD shall give prompt notice to the City and the City shall, to the extent of insurance, with due diligence, repair, rebuild or replace the same as that after such repairing, rebuilding or replacing, the Carolina Theatre shall be substantially the same as prior to such damage or destruction. If the City fails to undertake such work within 180 days after notice of the fire or other casualty, or shall fail to complete same diligently, within a reasonable time period agreed to between the City and CTD, then CTD may, at its option, terminate this Agreement by written notice to the City effective 30 days after the date of such notice. Termination of this Agreement, in such instance, shall be the CTD's sole remedy. Notwithstanding anything to the contrary contained herein, the City shall have no obligation for repair, rebuilding, or replacing the Carolina Theatre in the event all or a substantial portion of the CTD shall be destroyed or damaged by fire or casualty. However, in the event of damage or destruction of the Carolina Theatre in whole or in part, the City shall pay the Annual Fee due the CTD in the year of occurrence.

9.1.2 Notwithstanding the forgoing, in the event that the City by reason of unavailability of supplies, strikes, walkouts, or other matters beyond the City's control, shall be unable to complete the repair or restoration within the time period agreed to, the time period shall be extended accordingly.

9.1.3 In the event of any damage to or destruction of the Carolina Theatre, this Agreement shall remain in full force and effect until 30 days after the City has provided written notice to CTD of its decision to not repair or to demolish the Carolina Theatre.

**9.2 Condemnation.** In the event the Carolina Theatre, or such portion that renders the Carolina Theatre as a whole unusable for the purposes expressed herein, shall be taken or condemned in any eminent domain, condemnation, compulsory acquisition, expropriation, or like proceeding by any competent authority, then, in any such event, this Agreement shall terminate as of the date of the taking and CTD shall not be entitled to



participate in any award or compensation received for such a taking or condemnation. However, CTD shall be entitled to receive that portion of any award which provides compensation for property taken which was owned by CTD.

## **ARTICLE X**

### **TERMINATION, REMEDIES AND EXCULPATION**

#### **10.1 Termination**

10.1.1 If at any time during the term of this Agreement, commencing on the date hereof, the City shall breach or fail to perform any term, covenant or condition contained in this Agreement, and shall fail to cure or to commence a reasonable undertaking to cure such breach or failure within 30 days following notice thereof or shall thereafter fail to diligently pursue all necessary efforts to effect such cure, CTD may terminate this Agreement by giving written notice to the City. Termination of this Agreement shall be the sole remedy of CTD for any breach of this Agreement.

10.1.2 The City shall have the right to terminate this Agreement by notice to CTD if any one or more of the following events occur:

(a) If at any time during the term of this Agreement, CTD shall apply for or consent to the appointment of a receiver, trustees or liquidator of all or a substantial part of its assets or make a general assignment for the benefit of its creditors, or file a voluntary petition in bankruptcy or a petition seeking reorganization, composition, arrangement with creditors, liquidation or similar relief under any present or future statute, law or regulation, or file an answer admitting the material allegations of a petition filed against it in any proceeding under the bankruptcy or reorganization laws or to be adjudicated as bankrupt or insolvent.

(b) If any petition or complaint is filed without the application, approval or consent of CTD seeking reorganization, composition, arrangement with creditors, liquidation or similar relief under any present or future statute, law or regulation with respect to CTD seeking appointment of a receiver, trustee or liquidator thereof of all or a substantial part of such party's assets, and such petition or complaint shall be pending and not withdrawn or dismissed for an aggregate of 90 days (excluding any days during which such a petition would be stayed), whether or not consecutive.

(c) CTD shall fail to meet the Minimum Performance Standards as set forth in this Agreement and shall fail to cure within a reasonable time period to effectuate such cure with exercise of due diligence after notification by the City, but in no event greater than 30 days.

(d) CTD shall breach or fail to perform any term, covenant or condition contained in this Agreement and shall fail to cure within a reasonable time period required to effectuate such cure with exercise of due diligence after notification by the City, but in no event greater than 30 days.

10.1.3 If a shorter notice and cure period than 30 days is provided in any section of this Agreement, that shorter notice and cure period shall control. Only one notice and cure period shall apply to any particular breach or failure of performance.

10.1.4 The provisions in Section 10.1 shall be cumulative with, and not in derogation of, any other provisions of this Agreement with respect to Termination, including without limitation the provisions of Section 11.4.

## **10.2 Remedies upon Termination.**

10.2.1 In the event this Agreement is terminated as provided in Section 10.1, the City shall, within 30 days after the date of such termination, pay CTD all accrued and unpaid Annual Fee; provided that the obligation of the City to make such payment shall be subject to the right of offset in the event this Agreement is terminated by the City pursuant to any of the provisions of Section 10.1 or 11.4 or pursuant to any right to terminate at law or in equity. The Annual Fee shall be considered to have accrued only for such portion of the Fiscal Year as this Agreement is in effect prior to Termination, and any portions of the Annual Fee pre-paid by the City for portions of the Fiscal year when this Agreement is no longer in effect shall be refunded by CTD to the City.

10.2.2 In the event that this Agreement is terminated as provided in Section 10.1, CTD shall prepare or cause to be prepared financial statements in accordance with the applicable provisions of Section 6.2 for the period between the end of the last preceding Fiscal Year and the termination date, and CTD shall account to the City as of the termination date for all amounts due and payable specified in such financial statements. Such accounting shall be subject to post-termination adjustment to correct any errors in such statements. The obligation to make any such adjustment shall survive the expiration or the Termination date. In addition, as of the date of notice of the termination, CTD will take all necessary measures to effectuate the orderly and prompt termination of the relationship contemplated by this Agreement and the orderly and prompt transfer of operations, so that it can be complete as of the date of termination.

10.2.3 In the event this Agreement is terminated by the mutual agreement of the parties, neither party shall be liable to the other for any damages, costs or expenses arising out of such Termination except as may be expressly provided in any separate agreements or amendments now or hereafter executed by the parties with respect to such liability.

10.2.4 In the event this Agreement is terminated as provided in 10.1.2, the City shall agree to be assigned contracts for capital improvements that are affixed to the Carolina Theatre and artist contracts related to performances contracted for the Carolina Theatre, so long as such obligations are ones that were reasonable and prudent to incur in the operation of a First Class Municipal Arts Center.

## ARTICLE XI ASSIGNMENT

### 11.1 Assignment by CTD

11.1.1 CTD shall have no right to assign any of its rights, or interests under this Agreement to any other party.

11.1.2 CTD shall have the right to lease portions of the premises on a long-term basis to third parties providing goods and services which are complementary to the uses of CTD such as food and beverage providers, related merchandise vendors or entertainment providers. CTD shall be required to obtain written approval from City of all subleases that are one year or longer in duration.

**11.2 Assignment by the City.** Subject to the rights of CTD set forth in this Agreement, the City shall have the right to assign any of its rights or interests under this Agreement or to delegate any of its duties hereunder at any time to any third party or parties, provided that such third party shall expressly agree to be bound by the provisions and agreements herein contained. To the extent permitted by law, the City may not assign this Agreement to a person or entity whose principal business activity is the ownership or management of arts center facilities competitive with CTD.

**11.3 Notice of Assignment.** The City shall give prompt notice to CTD in writing specifying the terms and conditions of such transfer, the parties thereto and the expected effective date of such transfer.

**11.4 Unauthorized Assignment.** Any assignment, in part or in whole, by CTD shall be both null and void and a default permitting the City to terminate this Agreement.

## ARTICLE XII TAXES, IMPOSITIONS AND LIENS

**12.1 Taxes and Impositions.** All taxes, levies, assessments, utilities and similar charges on or relating to the Carolina Theatre, and not exempted through the CTD's not-for-profit status or otherwise provided for in this Agreement (hereinafter "Impositions"), shall be paid by CTD before it becomes delinquent, and before any fine, penalty, or interest is added thereto to the extent that such Impositions do not exceed the Annual Fee for that year. The City shall have no obligations for payment for any Impositions attributable to or allocable to CTD's presentations or programming.

**12.2 Liens.** CTD shall prevent any liens from being filed against the Carolina Theatre which arise from any maintenance, repairs, alterations, improvements, additions or replacements in or to the Carolina Theatre or any other acts or omissions of CTD. CTD shall act for itself and the City in this regard, unless the City directs otherwise, and if any liens are filed, CTD shall prevent any liens from becoming delinquent. The cost thereof, if the lien was not occasioned by the fault of either party, shall be treated

the same as the cost of the matter to which it relates. If the lien arises as a result of the fault of one party, then the party at fault shall bear the out-of-pocket cost of obtaining the lien release.

### **ARTICLE XIII**

#### **SALE OF THE CAROLINA THEATRE**

**13.1 Sale of the Carolina Theatre.** The City shall have the right to sell the Carolina Theatre to any bona fide third party purchaser without approval of CTD. The City shall provide a minimum of 550 days' notice to CTD of its intent to sell the Carolina Theatre and shall continue to pay CTD the Annual Fee specified in this Agreement through the date of transfer of ownership to the purchasing party.

### **ARTICLE XIV**

#### **MISCELLANEOUS**

#### **14.1 Indemnification**

14.1.1 To the extent allowed by law, CTD shall defend, indemnify and save harmless Indemnitees from and against all Charges that arise in any manner from, in connection with, or out of this Agreement as a result of the errors, omissions or acts of CTD or subcontractors, or anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable. In performing its duties under this subsection, CTD shall at its sole expense defend Indemnitees with legal counsel reasonably acceptable to City.

14.1.2 Definitions. As used in subsections 14.2.1 above and 14.2.3 below.

“Charges” means claims, judgments, costs, damages, losses, demands, liabilities, obligations, fines, penalties, royalties, settlements, and expenses (included without limitation within “Charges” are interest and reasonable attorneys’ fees assessed as part of any such item).

“City” means the City of Durham

“CTD” means all parties to this Agreement other than the City, as well as parties hired by or used by CTD to perform services.

“Indemnitees” means City and its officers, officials, independent contractors, agents, and employees.

14.1.3 Nothing in subsections 14.1.1 or 14.1.2 above shall affect any warranties in favor of the City that are otherwise provided under this Agreement. This section is in addition to and shall be construed separately from any other indemnification provisions that may apply to this Agreement.

14.1.4 If any claim, action or proceeding is made or brought against any Indemnatee by reason of any event as to which CTD is indemnifying any Indemnatee pursuant to this Article, then upon demand by such Indemnatee, CTD, by and through the attorneys for CTD's insurance carrier, shall resist or defend such claim, action or proceeding in such Indemnatee's name, if such claim, action or proceeding is covered by insurance, otherwise by such attorneys as the City shall approve. The City agrees that in the event that the City is named as party to an action, the City will reasonably cooperate with CTD in the conduct of the proceedings. Notwithstanding the foregoing, the City may engage its own attorneys to defend it or to assist in its defense of such claim, action or proceeding and, except for attorneys' fees and disbursements incurred by the City in connection with the defense of claims, actions or proceedings based solely upon the negligence of the City or in connection with the City's use of the Carolina Theatre, CTD shall pay all reasonable fees and disbursement of such attorneys.

CTD shall not represent the existence of an obligation on the part of the City to any third person without the City's prior written consent, nor shall CTD, in the name of or on behalf of the City, borrow any money or execute any promissory note, bill of exchange, or other obligation or mortgage or other encumbrance, and CTD hereby agrees to indemnify the City against any claims, including costs and expenses incident thereto, by reason of any such action.

14.1.5 Claims against CTD due to actions of Third Parties or Parties under Direct control of the City. In the event any act or omission of Indemnitees is the sole cause of CTD to be subject to the claims of third parties for breach of contract, then the City will reimburse CTD for uncontested portions of said loss within 10 days of being presented with documentation of said loss. CTD's obligation to indemnify shall not apply to Charges caused by the negligence, acts or omissions of Indemnitees.

14.1.6 CTD agrees to comply with the operation and maintenance standards and instructions found in any warranty or Required Service Contract relating to the Carolina Theatre of which it has received a copy. In the event that a repair or maintenance is required which is covered by such warranty or Required Service Contract and such warranty or Required Service Contract is not honored due to failure by CTD to operate and maintain in accordance with the terms of the warranty or the Required Service Contract, notwithstanding anything to the contrary contained in this Agreement, CTD shall make such repair and replacement as necessary or do such maintenance work with no contribution by the City regardless of whether or not it is deemed a Non-Routine Repair and Maintenance item.

**14.2 Public Bidding Requirement.** Notwithstanding any other provision of this Agreement, a precondition for payment or reimbursement by the City of any costs incurred or expenditures made by CTD pursuant to this Agreement is that CTD incur such costs or make such expenditures in compliance with City Purchasing guidelines and bidding requirements. CTD may continue to contract with and select artists and teaching artists and awards grants through jury processes and based on artistic and educational merit, not through bidding processes.

**14.3 Choice of Law and Forum.** This Agreement shall be deemed made in Durham County, North Carolina and shall be governed by and construed in accordance with the law of North Carolina. The exclusive forum and venue for all actions arising out of this Agreement shall be the North Carolina General Court of Justice, in Durham County. Such actions shall neither be commenced in nor removed to federal court.

**14.4 Headings.** Headings of Articles and Sections are inserted only for convenience and are in no way to be construed as a limitation on the scope of the particular Articles, Sections, or subsections to which they refer.

**14.5 Notices**

14.5.1 All notices, demands and other communications required or permitted under this Agreement shall be in writing, sent by hand delivery or by first class mail, postage pre-paid to the following addresses:

As to the City:

City Manager  
101 City Hall Plaza  
Durham, NC 27701

As to CTD:

The Carolina Theatre of Durham, Inc.  
309 West Morris Street  
Durham, NC 27701  
Attn: Chief Executive Officer

Either party to this Agreement may change its address or the person to whom the notice shall be sent by giving the other party written notice of its new address as herein provided.

14.5.2 Change of Address; Date Notice Deemed Given. A change of address, fax number, or person to receive notice may be made by either party by notice given to the other party. Any notice or other communication under this Agreement shall be deemed given at the time of actual delivery, if it is personally delivered or sent by fax. If the notice or other communication is sent by United States mail, it shall be deemed given upon the third calendar day following the day on which such notice or other communication is deposited with the United States Postal Service or upon actual delivery, whichever first occurs.

**14.6 Successors and Assigns.** This Agreement shall be binding upon the successors of the parties hereto, provided that this provision shall not be deemed to authorize the assignment or other transfer of this Agreement which may only be accomplished as expressly provided in this Agreement.

**14.7 Waiver.** The failure of either party to insist upon a strict performance of any of the terms or provisions of the Agreement, or to exercise any option, right or remedy herein contained, shall not be construed as a waiver or as a relinquishment for the future of such term, provision, option, right or remedy, but the same shall continue and remain in full force and effect. No waiver by either party of any term or provision hereof shall be deemed to have been made unless expressed in writing signed by such party.

**14.8 Performance of Governmental Functions.** Notwithstanding anything to the contrary contained in this Agreement, nothing contained in this Agreement shall in any way stop, limit or impair the City from exercising or performing any regulatory, policing or other authority it may possess with respect to the Carolina Theatre.

**14.9 Partial Invalidity.** If any term or provision of this Agreement or the application thereof to any person or circumstance shall to any extent or for any reason be invalid or unenforceable, the remainder of this Agreement and the application of such term or provision to persons or circumstances other than those as to which it is held invalid or unenforceable shall not be affected thereby, and each term and provision of this Agreement shall be valid and enforced to the fullest extent permitted by law.

**14.10 Counterparts.** This Agreement may be executed in any number of counterparts, each of which shall be an original and all of which shall constitute a single instrument.

**14.11 Force Majeure.** "Force Majeure" shall mean death or physical or other disability of any of the personnel forming part of or used in connection with the production of an Event, the acts or regulations of public authorities or labor unions, labor difficulties, strike, civil tumult, war, fire, severe weather, flood, national or local calamity, acts of public enemy or terrorism, epidemic, interruption or delay of transportation service, interruption of utilities or other municipal services, the breach of contract on the part of any third party, the unlawful act of any third party, or any cause beyond the reasonable control of the Parties. The City shall not assert in its favor that an event or act is a Force Majeure event or act to the extent that the event or act is substantially caused by the unreasonable act or omission of the City, or its officers, officials, employees, agents, contractors, or subcontractors of all tiers, but excluding the Operator. The Operator shall not assert in its favor that an event or act is a Force Majeure event or act to the extent that the event or act is substantially caused by the unreasonable act or omission of the Operator, or its officers, members, managers, board members, employees, agents, contractors, subcontractors of all tiers, but excluding the City.

**14.12 Entire Agreement.** The Agreement and the Exhibits hereto, together with any instruments to be executed and delivered pursuant to this Agreement, contain all the promises, agreements, conditions, inducements and understandings between the City and CTD as to the matter contained herein and covered hereby. There are no promises, agreements, conditions, understandings, inducements, warranties, or representations, oral or written, express or implied, between them other than as herein set forth, or other than as may be expressly

contained in this written agreement executed by the parties hereto or instruments executed by one party hereto and accepted by the other party hereto. All previously existing agreements, notes, conditions, inducements and understandings are replaced by this Agreement.

**14.13. No Third Party Rights Created.** This Agreement is intended for the benefit of the City and CTD and not any other person.

**14.14 Amendments and Modifications.** Any amendment or modification of this Agreement is not valid unless signed by both parties and otherwise in accordance with requirements of law. Further, a modification is not enforceable against the City unless the City Manager or a duly authorized Deputy or Assistant City Manager signs it for the City.

**14.15 Survival.** The parties' rights and obligations under this Agreement shall survive expiration or termination of this Agreement if such survival is required to fulfill the substance of such rights and obligations.

**14.16 Dispute Resolution.** In the event of any dispute, claim, question, or disagreement arising from or relating to this Agreement or a breach thereof, the parties shall use their best efforts to settle the dispute, claim, question, or disagreement ("Dispute"). To this effect, they shall consult and negotiate with each other in good faith and, recognizing their mutual interests, attempt to reach a just and equitable solution satisfactory to both parties. If they do not reach such solution within a period of 60 days, then, upon notice by either party to the other, all Disputes shall go through the following steps prior to the institution of litigation. The parties shall first take their Dispute to the City Manager. If the parties are not satisfied with the decision of the City Manager regarding the Dispute, they shall then take the matter to the City Council. Only after exhaustion of appeal to the City Manager and City Council may litigation be instituted arising from or related to this Agreement.

**14.17 Exhibits.**

The following exhibits are made a part of this Agreement:

Exhibit A: Facility Maintenance Plan

Exhibit B: Performance Measures

Exhibit C: Fixtures, Furnishings, and Equipment owned by The Carolina Theatre, Inc.

Exhibit D: City-Owned Fixtures, Furnishings and Equipment

Exhibit E: Insurance Certificates and Privilege License

In case of conflict between an exhibit and the text of this Agreement excluding the exhibit, the text of this Agreement shall control.

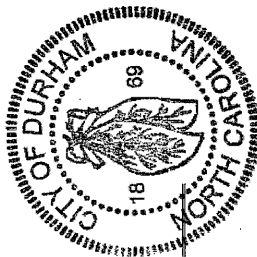


IN WITNESS WHEREOF, the City and the CTD have caused this Agreement to be executed under seal themselves or by their respective duly authorized agents or officers.

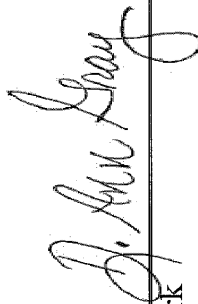
CITY OF DURHAM

  
Thomas J. Bonfield  
City Manager

THOMAS J. BONFIELD  
CITY MANAGER



Attest:



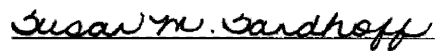
City Clerk

THE CAROLINA THEATRE OF DURHAM, INC.

  
BOB NOCEK  
PRESIDENT/CHIEF EXECUTIVE OFFICER

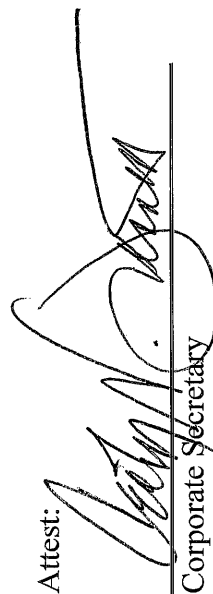
(Affix Corporate Seal)

This instrument has been pre-audited in the manner required by the  
Local Government Budget and Fiscal Control Act.



Susan M. Sandhoff - Deputy Finance Officer

Attest:

  
Corporate Secretary

STATE OF NORTH CAROLINA    ACKNOWLEDGMENT BY CITY OF DURHAM  
COUNTY of DURHAM

I, a Notary Public in and for the aforesaid County and State certify that \_\_\_\_\_ personally appeared before me this day, and acknowledged that he or she is the City Clerk of the City of Durham, a municipal corporation, and that by authority duly given and as the act of the City, the foregoing contract was signed in its corporate name by its City Manager, sealed with its corporate seal, and attested by its said City Clerk. This the \_\_\_\_\_ day of \_\_\_\_\_, 201\_.

My commission expires: \_\_\_\_\_

\_\_\_\_\_  
Notary Public

STATE OF NORTH CAROLINA    ACKNOWLEDGMENT BY THE CAROLINA  
THEATRE OF DURHAM, INC.  
COUNTY of Durham

I, a Notary Public in and for the aforesaid County and State, certify that Cecily Durrett personally appeared before me this day and stated that he or she is Secretary of The Carolina Theatre of Durham, Inc., A North Carolina Non-Profit Organization (501c3) and that by authority duly given and as the act of the corporation, the foregoing contract with the City of Durham was signed in its name by its President/Chief Executive Officer, whose name is Bob Nocek, sealed with its corporate seal, and attested by him/herself as its said Secretary or Assistant Secretary. This the 23 day of April, 2014.

My commission expires: April 23, 2018

\_\_\_\_\_  
Cora Bryant  
Notary Public

